

EXHIBIT NO. 1

14  
1-26-02


18  
1-8-02

City of Alexandria, Virginia

MEMORANDUM

DATE: JANUARY 3, 2002

TO: THE HONORABLE MAYOR AND MEMBERS OF CITY COUNCIL

FROM: PHILIP SUNDERLAND, CITY MANAGER 

SUBJECT: ORDINANCE TO AMEND THE CITY CODE TO CONFORM CITY  
PROCUREMENT REGULATIONS TO RECENT CHANGES IN STATE LAW  
AND TO BRING THE CITY CODE PROVISIONS APPLICABLE TO  
EMPLOYMENT PRACTICES BY CITY CONTRACTORS INTO  
CONFORMANCE WITH THOSE PROVISIONS GENERALLY APPLICABLE  
TO EMPLOYERS IN THE CITY

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**ISSUE:** Consideration of an ordinance to amend the City Code to conform City procurement regulations to recent changes enacted by the General Assembly, including procedures for the recovery of damages caused by delays and permitting contracts with certain faith-based organizations, and to bring the City Code provisions applicable to employment practices by City contractors into conformance with those provisions generally applicable to employers in the City.

**RECOMMENDATION:** That City Council pass the proposed ordinance (Attachment I) on first reading, and set it for public hearing, second reading and final passage on Saturday, January 26, 2002.

**DISCUSSION:** The proposed ordinance brings the City procurement code into conformance with the mandatory provisions of the Virginia Public Procurement Act, and brings the provisions of the City Code applicable to employment practices by City contractors into conformance with those provisions generally applicable to employers in the City.

The General Assembly of Virginia prescribes that certain provisions of the Virginia Public Procurement Act (VPPA) are mandatory for adoption by political subdivisions of the Commonwealth even when the governing body of the local political subdivision has no desire to adopt such provisions. The proposed ordinance implements the mandatory changes made by the General Assembly to the VPPA, by amending the following sections of the City Code.

#### Section 3-3-51.1 Damages for delays.

The proposed ordinance adds Section 3-3-51.1 to the City Code, which establishes procedures for the recovery of costs and damages by the City and contractors in the event of delays on public construction contracts. This new section prescribes the criteria for dealing with delay claims made by construction contractors. It authorizes the City to recover costs incurred in preparing for negotiation, litigation or arbitration of contractor's delay claims, when the contractor's claim is found to have no basis in law or fact. The section also provides for a contractor to recover costs or damages for delay claims when the City's denial of such claims is determined after litigation or arbitration to have been made in bad faith. Previous versions of the VPPA contained provisions authorizing public bodies to recover damages when contractors filed delay claims that were not upheld in court. The new provision grants a similar authorization for contractors to recover damages when a court or arbitrator finds that the delay claim was denied by the public body in bad faith.

#### Section 3-3-62 Conditions for use.

The proposed ordinance adds a subparagraph to Section 3-3-62 allowing a determination to be made for the use of competitive negotiation as an exception to competitive bidding for design-build and construction management contracts. This change adds a direct reference to Section 3-3-70, design-build and construction management contracts, in the previous section of the Code that authorizes exceptions to competitive bidding of certain construction contracts through the use of competitive negotiation.

#### Section 3-3-70 Design-build and construction management contracts.

The proposed ordinance adds a clause to Section 3-3-70 that requires the employment of a licensed architect or engineer to advise the City in the evaluation of design-build or construction management proposals. The employment of a licensed architect or engineer was required in the original version of this section only for advice regarding the use of design-build or construction management contracts and to assist with the preparation of requests for qualifications and requests for proposals.

#### Section 3-3-79 Permitted contracts with certain religious organizations; purpose; limitations.

The proposed ordinance adds new sections to the Code which authorizes the City, when procuring goods or services for programs funded pursuant to the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), P.L. 104-193, to enter into contracts with faith-based organizations on the same basis as any other non-governmental organization. PRWORA is the 1996 federal law that enacted reforms to the welfare system. This law includes changes to the rules for limits to the lifetime use of welfare, work requirements for those on welfare, and rules for child support enforcement. Last year, the City administered approximately \$1.5 million for programs related to PRWORA. The City currently contracts with

the Salvation Army for operation of the Alexandria Community Shelter (ACS) using PRWORA funds, as well as City General Funds. The City also contracts with ALIVE for a mentoring program that provides service to approximately ten VIEW recipients per month. The ALIVE program uses PRWORA funds. Both The Salvation Army and ALIVE are faith-based organizations.

This new mandatory section prohibits the City from discriminating against faith-based organizations when procuring goods or services pursuant to the PRWORA, and it prohibits faith-based organizations receiving funds pursuant to the PRWORA from discriminating against recipients of services based on religion, race, age, color, gender or national origin. Expenditures of funds from permitted City contracts shall not be spent for sectarian worship, instruction or proselytizing. The faith-based organization is permitted to exercise its right under federal law to employ persons from a particular religion. The City is required to provide equivalent goods, services or disbursements from a non-faith-based organization to any recipient who objects to the religious character of the organization providing services under a City contract funded with PRWORA monies. The City Department of Human Services is in the process of developing a plan to provide alternative services to service recipients who so request. The required text of a notice to be mandatorily provided by the City to recipients of services funded under PRWORA is included in the section. These new Code provisions will be incorporated into the City's contracts with The Salvation Army and ALIVE.

Section 3-3-123 Proscribed participation by public employees in procurement transactions.

Section 3-3-128 Purchase of buildings materials, etc., from architect or engineer prohibited.

The proposed ordinance makes technical changes to the conflict of interest sections of the City procurement code. These changes cross reference the Code section to an exception provision in the Virginia Code, which prohibits conduct concerning personal interest in a transaction, and adds an emergency exception provision to the City's procurement conflict of interest sections.

The proposed ordinance also makes changes to the City Code which are not mandatory, as follows. The proposed ordinance amends Section 12-4-6 of the City Code to bring the provisions of the City's human rights code applicable to employment practices by City contractors into conformance with the human rights code provisions generally applicable to employers in the City. Although the human rights code currently includes sexual orientation in sections relating to housing, real estate, employment, health and social services practices, public accommodations, credit and education, the section of the code relating to City contracts does not contain the same protection.

The amendment to Section 12-4-6, by adding the words 'sexual orientation' to the list of protected classes, prohibits contractors operating under a City contract of more than \$10,000 from discriminating against any employee on the basis of sexual orientation. This change provides consistent language throughout the City's human rights code and brings the provisions of the City Code applicable to employment practices by City contractors into conformance with those provisions generally applicable to employers in the City.

**FISCAL IMPACT:** There is no fiscal impact from these changes to the City Code.

**ATTACHMENT:**

Attachment 1 - Proposed Ordinance

**STAFF:**

Mark Jinks, Assistant City Manager for Fiscal and Financial Affairs

D.A. Neckel, Director of Finance

Jack T. Pitzer, Purchasing Agent, Department of Finance

1-26-02      ~~1-8-02~~

Introduction and first reading:	1/08/02
Public hearing:	1/26/02
Second reading and enactment:	1/26/02

### INFORMATION ON PROPOSED ORDINANCE

#### Title

AN ORDINANCE (1)(a) to enact new Section 3-3-51.1 (DAMAGES FOR DELAYS), of Division 1 (COMPETITIVE SEALED BIDDING), (b) to amend and reordain Section 3-3-62 (CONDITIONS FOR USE) and subsection (b) of Section 3-3-70 (DESIGN-BUILD AND CONSTRUCTION MANAGEMENT CONTRACTS), of Division 2 (COMPETITIVE NEGOTIATION), and (c) to enact new Section 3-3-79 (PERMITTED CONTRACTS WITH CERTAIN RELIGIOUS ORGANIZATIONS; PURPOSE; LIMITATIONS), of Division 3 (MISCELLANEOUS PROVISIONS), all of Article D (CONTRACT FORMATION AND METHODS OF SOURCE SELECTION); and (2) to amend and reordain Sections 3-3-123 (PROSCRIBED PARTICIPATION BY PUBLIC EMPLOYEES IN PROCUREMENT TRANSACTIONS) and 3-3-128 (PURCHASE OF BUILDING MATERIALS, ETC. FROM ARCHITECT OR ENGINEER PROHIBITED) of Article I (ETHICS IN PUBLIC CONTRACTING), all of Chapter 3 (PROCUREMENT), Title 3 (FINANCE, TAXATION AND PROCUREMENT), and (3) to amend and reordain Section 12-4-6 (CITY CONTRACTS) of Chapter 4 (HUMAN RIGHTS), TITLE 12 (EDUCATION, SOCIAL SERVICES AND WELFARE), all of The Code of the City of Alexandria, Virginia, 1981, as amended.

#### Summary

The proposed ordinance brings the city procurement code into conformance with the mandatory provisions of the Virginia Public Procurement Act, and brings the provisions of the city code applicable to employment practices by city contractors into conformance with those provisions generally applicable to employers in the city.

#### Sponsor

None

#### Staff

Mark Jinks, Assistant City Manager  
Jack T. Pitzer, Purchasing Agent  
Steven L. Rosenberg, Senior Assistant City Attorney

Authority

§ 2.01, Alexandria City Charter  
§§ 5.12 and 5.13, Alexandria City Charter  
§ 2.2-4300 et seq., Code of Virginia (1950), as amended

Estimated Costs of Implementation

None

Attachments in Addition to Proposed Ordinance and its Attachments (if any)

None

1-26-02      ~~1-8-02~~

ORDINANCE NO. \_\_\_\_\_

AN ORDINANCE to enact new Section 3-3-51.1 (DAMAGES FOR DELAYS), of Division 1 (COMPETITIVE SEALED BIDDING), to amend and reordain Section 3-3-62 (CONDITIONS FOR USE) and subsection (b) of Section 3-3-70 (DESIGN-BUILD AND CONSTRUCTION MANAGEMENT CONTRACTS), of Division 2 (COMPETITIVE NEGOTIATION), and to enact new Section 3-3-79 (PERMITTED CONTRACTS WITH CERTAIN RELIGIOUS ORGANIZATIONS; PURPOSE; LIMITATIONS), of Division 3 (MISCELLANEOUS PROVISIONS), all of Article D (CONTRACT FORMATION AND METHODS OF SOURCE SELECTION); to amend and reordain Sections 3-3-123 (PROSCRIBED PARTICIPATION BY PUBLIC EMPLOYEES IN PROCUREMENT TRANSACTIONS) and 3-3-128 (PURCHASE OF BUILDING MATERIALS, ETC. FROM ARCHITECT OR ENGINEER PROHIBITED) of Article I (ETHICS IN PUBLIC CONTRACTING), all of Chapter 3 (PROCUREMENT), Title 3 (FINANCE, TAXATION AND PROCUREMENT), and to amend and reordain Section 12-4-6 (CITY CONTRACTS) of Chapter 4 (HUMAN RIGHTS), TITLE 12 (EDUCATION, SOCIAL SERVICES AND WELFARE), all of The Code of the City of Alexandria, Virginia, 1981, as amended.

THE CITY COUNCIL OF ALEXANDRIA HEREBY ORDAINS:

Section 1. That Chapter 3 of Title 3 of The Code of the City of Alexandria, Virginia, 1981, as amended, be, and the same hereby is amended by adding new section 3-3-51.1 to read as follows:

[The following is all new language]

Sec. 3-3-51.1      Damages for delays.

(a) Any provision contained in any public construction contract that purports to waive, release, or extinguish the rights of a contractor to recover costs or damages for unreasonable delay in performing such contract, either on his behalf or on behalf of his subcontractor if and to the extent the delay is caused by acts or omissions of the city, its agents or employees and due to causes within their control shall be void and unenforceable as against public policy.

(b) Subsection (a) shall not be construed to render void any provision of a public construction contract that:

- (1) allows the city to recover that portion of delay costs caused by the acts or omissions of the contractor, or its subcontractors, agents or employees;
- (2) requires notice of any delay by the party claiming the delay;
- (3) provides for liquidated damages for delay; or
- (4) provides for arbitration or any other procedure designed to settle contract disputes.

(c) A contractor making a claim against the city for costs or damages due to the alleged delaying of the contractor in the performance of its work under any public construction contract shall be liable to the city and shall pay it for a percentage of all costs incurred by the city in investigating, analyzing, negotiating, litigating and arbitrating the claim, which percentage shall be equal to the percentage of the contractor's total delay claim that is determined through litigation or arbitration to be false or to have no basis in law or in fact.

(d) Upon denial of a contractor's claim for costs or damages due to the alleged delaying of the contractor in the performance of work under any public construction contract, the city shall be liable to and shall pay such contractor a percentage of all costs incurred by the contractor to investigate, analyze, negotiate, litigate and arbitrate the claim. The percentage paid by the city shall be equal to the percentage of the contractor's total delay claim for which the city's denial is determined through litigation or arbitration to have been made in bad faith.

Section 2. That section 3-3-62 of The Code of the City of Alexandria, Virginia, 1981, as amended, be, and the same hereby is, amended and reordained to read as follows:

Sec. 3-3-62                      Conditions for use.

(a) Upon a determination made in advance by the purchasing agent and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, goods, services or insurance may be procured by competitive negotiation. The writing shall document the basis for this determination. Notwithstanding the foregoing, upon a determination made in advance by the purchasing agent that the procurement of insurance by competitive negotiation is either not practicable or not fiscally advantageous, insurance may be procured through a licensed broker or agent selected through competitive negotiation. The basis for this determination shall be documented in writing.

(b) Construction may be procured only by competitive sealed bidding, except that competitive negotiation may be used in the following instances upon a determination made in advance by the purchasing agent and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, which writing shall document the basis for this determination:

(1) The alteration, repair, renovation or demolition of buildings when the contract is expected to equal or be less than \$500,000;

(2) The construction of highways, streets and alleys;~~or~~

(3) The draining, dredging, excavation or grading of, or similar work upon, real property;  
or

(4) As otherwise provided in § 3-3-70.



Section 3. That subsection (b) of section 3-3-70 of The Code of the City of Alexandria, Virginia, 1981, as amended, be, and the same hereby is, amended and reordained to read as follows:

Sec. 3-3-70            Design-build and construction management contracts.

(b)     Prior to making a determination as to the use of design-build or construction management for a specific construction project, the city shall employ or contract with a licensed architect or engineer with professional competence appropriate to the project to advise the city regarding the use of design-build or construction management for that project and to assist in the preparation of the request for qualifications and the request for proposals and the evaluation of such proposals.

Section 4. That Chapter 3 of Title 3 of The Code of the City of Alexandria, Virginia, 1981, as amended, be, and the same hereby is amended by adding new section 3-3-79 to read as follows:

[The following is all new language]

Sec. 3-3-79            Permitted contracts with certain religious organizations; purpose; limitations.

(a)     It is the intent of the city council, in accordance with the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193, to authorize the city to enter into contracts with faith-based organizations for the purposes described in this section on the same basis as any other nongovernmental source without impairing the religious character of such organization, and without diminishing the religious freedom of the beneficiaries of assistance provided under this section.

(b)     For the purposes of this section, "faith-based organization" means a religious organization that is or applies to be a contractor to provide goods or services for programs funded by the block grant provided pursuant to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193.

(c)     The city, in procuring goods or services, or in making disbursements pursuant to this section, shall not (i) discriminate against a faith-based organization on the basis of the organization's religious character or (ii) impose conditions that restrict the religious character of the faith-based organization, except as provided in subsection (f), or impair, diminish, or discourage the exercise of religious freedom by the recipients of such goods, services, or disbursements.

(d)     The city shall ensure that all invitations to bid, requests for proposals, contracts, and purchase orders prominently display a nondiscrimination statement indicating that the city does not discriminate against faith-based organizations.

(e) A faith-based organization contracting with the city (i) shall not discriminate against any recipient of goods, services, or disbursements made pursuant to a contract authorized by this section on the basis of the recipient's religion, religious belief, refusal to participate in a religious practice, or on the basis of race, age, color, gender or national origin and (ii) shall be subject to the same rules as other organizations that contract with the city to account for the use of the funds provided; however, if the faith-based organization segregates public funds into separate accounts, only the accounts and programs funded with public funds shall be subject to audit by the city. Nothing in clause (ii) shall be construed to supercede or otherwise override any other applicable state law.

(f) Consistent with the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193, funds provided for expenditure pursuant to contracts with the city shall not be spent for sectarian worship, instruction, or proselytizing; however, this prohibition shall not apply to expenditures pursuant to contracts, if any, for the services of chaplains.

(g) Nothing in this section shall be construed as barring or prohibiting a faith-based organization from any opportunity to make a bid or proposal or contract on the grounds that the faith-based organization has exercised the right, as expressed in 42 U.S.C. (§ 2000e-1 et seq.), to employ persons of a particular religion.

(h) If an individual, who applies for or receives goods, services, or disbursements provided pursuant to a contract between the city and a faith-based organization, objects to the religious character of the faith-based organization from which the individual receives or would receive the goods, services, or disbursements, the city shall offer the individual, within a reasonable period of time after the date of his objection, access to equivalent goods, services, or disbursements from an alternative provider.

(i) The city shall provide to each individual who applies for or receives goods, services, or disbursements provided pursuant to a contract between the city and a faith-based organization a notice in bold face type that states: "Neither the city's selection of a charitable or faith-based provider of services nor the expenditure of funds under this contract is an endorsement of the provider's charitable or religious character, practices, or expression. No provider of services may discriminate against you on the basis of religion, a religious belief, or your refusal to actively participate in a religious practice. If you object to a particular provider because of its religious character, you may request assignment to a different provider. If you believe that your rights have been violated, please discuss the complaint with your provider or notify the appropriate person as indicated in this form."

Section 5. That section 3-3-123 of The Code of the City of Alexandria, Virginia, 1981, as amended, be, and the same hereby is, amended and reordained to read as follows:

Sec. 3-3-123            Proscribed participation by public employees in procurement transactions.

Except as may be specifically allowed by subdivisions (A)(2) and (A)(3) of § 2.2-3112 of the Code of Virginia (1950), as amended, no No public employee having official responsibility for a procurement transaction shall participate in that transaction on behalf of the city when the employee knows that:

- (a)     The employee is contemporaneously employed by a bidder, offeror or contractor involved in the procurement transaction; or
- (b)     The employee, the employee's partner or any member of the employee's immediate family holds a position with a bidder, offeror or contractor such as an officer, director, trustee, partner or the like, or is employed in a capacity involving personal and substantial participation in the procurement transaction, or owns or controls an interest of more than five percent; or
- (c)     The employee, the employee's partner or any member of the employee's immediate family has a pecuniary interest arising from the procurement transaction; or
- (d)     The employee, the employee's partner or any member of the employee's immediate family is negotiating, or has an arrangement concerning prospective employment with a bidder, offeror or contractor.

Section 6. That section 3-3-128 of The Code of the City of Alexandria, Virginia, 1981, as amended, be, and the same hereby is, amended and reordained to read as follows:

Sec. 3-3-128            Purchase of building materials, etc., from architect or engineer prohibited.

- (a)     Except in cases of emergency, no building materials, supplies or equipment for any building or structure constructed by or for the city shall be sold by or purchased from any person employed as an independent contractor by the city to furnish architectural or engineering services, but not construction, for such building or structure, or from any partnership, association or corporation in which such architect or engineer has a pecuniary interest arising from the procurement.
- (b)     ~~No~~Except in cases of emergency, no building materials, supplies or equipment for any building or structure constructed by or for the city shall be sold by or purchased from any person who has provided or is providing design services to the independent contractor employed by the city to furnish architectural or engineering services for such building or structure, if such person (i) has specified a sole source for such materials, supplies or equipment, and (ii) has a pecuniary interest arising from the procurement in such architect or engineer.

Section 7. That section 12-4-6 of The Code of the City of Alexandria, Virginia, 1981, as amended, be, and the same hereby is, amended and reordained to read as follows:

(a) Any contract of over \$10,000, except any contract for the sale, purchase or rental of land, to which the city is a party shall include substantially the following provisions:

“Employment Opportunity. The contractor hereby agrees:

“(1) Not to discriminate against any employee or applicant for employment on account of race, color, sex, religion, ancestry, national origin, marital status, age, sexual orientation, disability, when such person is a qualified person with a disability, or any other basis prohibited by state law relating to discrimination in employment, except where there is a bona fide occupational qualification reasonably necessary to the normal operation of the contractor. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause.

“(2) To implement an affirmative action employment program as defined in section 12-4-3 of this chapter to ensure nondiscrimination in employment under guidelines to be developed by the commission and approved by the city council.

“(3) To include in all solicitations or advertisements for employees placed by or on behalf of the contractor the words “Equal Opportunity Employer” or a symbol, approved by the commission, meaning same.

“(4) To notify each labor organization or representative of employees with which said contractor is bound by a collective bargaining agreement or other contract of the contractor's obligations pursuant to this equal employment opportunity clause.

“(5) To submit to the city manager and the city's human rights administrator, upon request, no more frequently than annually, regular equal employment opportunity reports on a form to be prescribed by the city's human rights administrator with the approval of the city manager, except that the administrator may request more frequent special reports of particular employers provided the commission has found such employers to have violated any provision of this chapter.

“(6) Notices, advertisements and solicitations placed in accordance with federal law, rule or regulation shall be deemed sufficient for the purpose of meeting the requirements of this subsection.

“(7) To make reasonable accommodation to the known physical or mental limitations of an otherwise qualified person with a disability who is an applicant or employee unless the contractor can demonstrate that the accommodation would impose an undue hardship on the operation of its business.

“(8) That for the purpose of this section reasonable accommodation may include (i) making facilities used by employees readily accessible to and usable by persons with a disability and (ii) job restructuring, part-time or modified work schedules, acquisitions or modification of equipment or devices, the provision of readers or interpreters and other similar actions.

“(9) That in determining whether an accommodation would impose an undue hardship on the operation of the contractor's business, factors to be considered include but are not limited to the following:

“a. the overall size of the contractor's business with respect to the number of employees, the number and type of facilities and size of budget;

“b. the type of the contractor's operation, including the composition and structure of the contractor's work force; and

“c. the nature and cost of the accommodation needed.

“(10) That it may not deny any employment opportunity to a qualified person with a disability who is an employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

“(11) To include the provisions in subsections (1) through (10) of this clause in every subcontract so that such provisions will be binding upon each subcontractor.

“(12) That in the event of the contractor's noncompliance with any provision of this equal employment opportunity clause, upon a finding of such noncompliance by the city's human rights commission and certification of such finding by the city manager, the city council may terminate or suspend or not renew, in whole or in part, this contract.”

(b) The administrator is hereby authorized to:

(1) review the performance of any contractor who has a contract with the city with respect to the provisions of subsection (a) above;

(2) request equal employment opportunity reports, including but not limited to statistical data, from any contractor pursuant to subsection (a)(5) above; and

(3) upon a finding of probable cause to believe a violation of any provision of subsection (a) above has occurred, file a complaint with the commission pursuant to section 12-4-16 of this chapter.

(c) The commission is hereby authorized to:

(1) review any complaint filed by the administrator pursuant to subsection (b) above in accordance with procedures set forth in this chapter; and

(2) upon a finding of the commission that any contractor is in noncompliance with the provisions of subsection (a) above, the commission shall report the findings to the city manager.

(d) The city manager. If the city manager certifies the finding to the city council the city manager shall, unless city council directs otherwise, terminate or suspend or not renew, in whole or in part, as appropriate, the contractual relationship with the contractor; provided, however, that the city manager may defer temporarily a suspension or termination if he or she finds that the suspension or termination may disrupt or curtail a vital public service, or would otherwise not be in the best interests of the city, in which case the city manager shall report his or her action to the city council and indicate a date certain when the relationship will be suspended or terminated, or when the practice complained about will be remedied.

Section 8. That this ordinance shall become effective upon the date and at the time of its final passage.

KERRY J. DONLEY  
Mayor

Introduction:	1/8/02
First Reading:	1/8/02
Publication:	1/10/02
Public Hearing:	1/26/02
Second Reading:	1/26/02
Final Passage:	

N.B. Underlining is not part of the ordinance but denotes material that is new or amended.  
Strike-outs or dashes are not part of the ordinance but denote material that is being deleted.

ORDINANCE NO. 4232

AN ORDINANCE to enact new Section 3-3-51.1 (DAMAGES FOR DELAYS), of Division 1 (COMPETITIVE SEALED BIDDING), to amend and reordain Section 3-3-62 (CONDITIONS FOR USE) and subsection (b) of Section 3-3-70 (DESIGN-BUILD AND CONSTRUCTION MANAGEMENT CONTRACTS), of Division 2 (COMPETITIVE NEGOTIATION), and to enact new Section 3-3-79 (PERMITTED CONTRACTS WITH CERTAIN RELIGIOUS ORGANIZATIONS; PURPOSE; LIMITATIONS), of Division 3 (MISCELLANEOUS PROVISIONS), all of Article D (CONTRACT FORMATION AND METHODS OF SOURCE SELECTION); to amend and reordain Sections 3-3-123 (PROSCRIBED PARTICIPATION BY PUBLIC EMPLOYEES IN PROCUREMENT TRANSACTIONS) and 3-3-128 (PURCHASE OF BUILDING MATERIALS, ETC. FROM ARCHITECT OR ENGINEER PROHIBITED) of Article I (ETHICS IN PUBLIC CONTRACTING), all of Chapter 3 (PROCUREMENT), Title 3 (FINANCE, TAXATION AND PROCUREMENT), and to amend and reordain Section 12-4-6 (CITY CONTRACTS) of Chapter 4 (HUMAN RIGHTS), TITLE 12 (EDUCATION, SOCIAL SERVICES AND WELFARE), all of The Code of the City of Alexandria, Virginia, 1981, as amended.

THE CITY COUNCIL OF ALEXANDRIA HEREBY ORDAINS:

Section 1. That Chapter 3 of Title 3 of The Code of the City of Alexandria, Virginia, 1981, as amended, be, and the same hereby is, amended by adding new section 3-3-51.1 to read as follows:

Sec. 3-3-51.1            Damages for delays.

(a)     Any provision contained in any public construction contract that purports to waive, release, or extinguish the rights of a contractor to recover costs or damages for unreasonable delay in performing such contract, either on his behalf or on behalf of his subcontractor if and to the extent the delay is caused by acts or omissions of the city, its agents or employees and due to causes within their control shall be void and unenforceable as against public policy.

(b)     Subsection (a) shall not be construed to render void any provision of a public construction contract that:

(1)     allows the city to recover that portion of delay costs caused by the acts or omissions of the contractor, or its subcontractors, agents or employees;

(2)     requires notice of any delay by the party claiming the delay;

(3)     provides for liquidated damages for delay; or

(4)     provides for arbitration or any other procedure designed to settle contract disputes.

(c)     A contractor making a claim against the city for costs or damages due to the alleged delaying of the contractor in the performance of its work under any public construction contract

shall be liable to the city and shall pay it for a percentage of all costs incurred by the city in investigating, analyzing, negotiating, litigating and arbitrating the claim, which percentage shall be equal to the percentage of the contractor's total delay claim that is determined through litigation or arbitration to be false or to have no basis in law or in fact.

(d) Upon denial of a contractor's claim for costs or damages due to the alleged delaying of the contractor in the performance of work under any public construction contract, the city shall be liable to and shall pay such contractor a percentage of all costs incurred by the contractor to investigate, analyze, negotiate, litigate and arbitrate the claim. The percentage paid by the city shall be equal to the percentage of the contractor's total delay claim for which the city's denial is determined through litigation or arbitration to have been made in bad faith.

Section 2. That section 3-3-62 of The Code of the City of Alexandria, Virginia, 1981, as amended, be, and the same hereby is, amended and reordained to read as follows:

Sec. 3-3-62                      Conditions for use.

(a) Upon a determination made in advance by the purchasing agent and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, goods, services or insurance may be procured by competitive negotiation. The writing shall document the basis for this determination. Notwithstanding the foregoing, upon a determination made in advance by the purchasing agent that the procurement of insurance by competitive negotiation is either not practicable or not fiscally advantageous, insurance may be procured through a licensed broker or agent selected through competitive negotiation. The basis for this determination shall be documented in writing.

(b) Construction may be procured only by competitive sealed bidding, except that competitive negotiation may be used in the following instances upon a determination made in advance by the purchasing agent and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, which writing shall document the basis for this determination:

(1) The alteration, repair, renovation or demolition of buildings when the contract is expected to equal or be less than \$500,000;

(2) The construction of highways, streets and alleys;

(3) The draining, dredging, excavation or grading of, or similar work upon, real property;  
or

(4) As otherwise provided in § 3-3-70.



Section 3. That subsection (b) of section 3-3-70 of The Code of the City of Alexandria, Virginia, 1981, as amended, be, and the same hereby is, amended and reordained to read as follows:

Sec. 3-3-70                      Design-build and construction management contracts.

(b)        Prior to making a determination as to the use of design-build or construction management for a specific construction project, the city shall employ or contract with a licensed architect or engineer with professional competence appropriate to the project to advise the city regarding the use of design-build or construction management for that project and to assist in the preparation of the request for qualifications and the request for proposals and the evaluation of such proposals.

Section 4. That Chapter 3 of Title 3 of The Code of the City of Alexandria, Virginia, 1981, as amended, be, and the same hereby is, amended by adding new section 3-3-79 to read as follows:

Sec. 3-3-79                      Permitted contracts with certain religious organizations; purpose; limitations.

(a)        It is the intent of the city council, in accordance with the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193, to authorize the city to enter into contracts with faith-based organizations for the purposes described in this section on the same basis as any other nongovernmental source without impairing the religious character of such organization, and without diminishing the religious freedom of the beneficiaries of assistance provided under this section.

(b)        For the purposes of this section, "faith-based organization" means a religious organization that is or applies to be a contractor to provide goods or services for programs funded by the block grant provided pursuant to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193.

(c)        The city, in procuring goods or services, or in making disbursements pursuant to this section, shall not (i) discriminate against a faith-based organization on the basis of the organization's religious character or (ii) impose conditions that restrict the religious character of the faith-based organization, except as provided in subsection (f), or impair, diminish, or discourage the exercise of religious freedom by the recipients of such goods, services, or disbursements.

(d)        The city shall ensure that all invitations to bid, requests for proposals, contracts, and purchase orders prominently display a nondiscrimination statement indicating that the city does not discriminate against faith-based organizations.

(e) A faith-based organization contracting with the city (i) shall not discriminate against any recipient of goods, services, or disbursements made pursuant to a contract authorized by this section on the basis of the recipient's religion, religious belief, refusal to participate in a religious practice, or on the basis of race, age, color, gender or national origin and (ii) shall be subject to the same rules as other organizations that contract with the city to account for the use of the funds provided; however, if the faith-based organization segregates public funds into separate accounts, only the accounts and programs funded with public funds shall be subject to audit by the city. Nothing in clause (ii) shall be construed to supercede or otherwise override any other applicable state law.

(f) Consistent with the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193, funds provided for expenditure pursuant to contracts with the city shall not be spent for sectarian worship, instruction, or proselytizing; however, this prohibition shall not apply to expenditures pursuant to contracts, if any, for the services of chaplains.

(g) Nothing in this section shall be construed as barring or prohibiting a faith-based organization from any opportunity to make a bid or proposal or contract on the grounds that the faith-based organization has exercised the right, as expressed in 42 U.S.C. (§ 2000e-1 et seq.), to employ persons of a particular religion.

(h) If an individual, who applies for or receives goods, services, or disbursements provided pursuant to a contract between the city and a faith-based organization, objects to the religious character of the faith-based organization from which the individual receives or would receive the goods, services, or disbursements, the city shall offer the individual, within a reasonable period of time after the date of his objection, access to equivalent goods, services, or disbursements from an alternative provider.

(i) The city shall provide to each individual who applies for or receives goods, services, or disbursements provided pursuant to a contract between the city and a faith-based organization a notice in bold face type that states: "Neither the city's selection of a charitable or faith-based provider of services nor the expenditure of funds under this contract is an endorsement of the provider's charitable or religious character, practices, or expression. No provider of services may discriminate against you on the basis of religion, a religious belief, or your refusal to actively participate in a religious practice. If you object to a particular provider because of its religious character, you may request assignment to a different provider. If you believe that your rights have been violated, please discuss the complaint with your provider or notify the appropriate person as indicated in this form."

Section 5. That section 3-3-123 of The Code of the City of Alexandria, Virginia, 1981, as amended, be, and the same hereby is, amended and reordained to read as follows:

Sec. 3-3-123            Proscribed participation by public employees in procurement transactions.

Except as may be specifically allowed by subdivisions (A)(2) and (A)(3) of § 2.2-3112 of the Code of Virginia (1950), as amended, no public employee having official responsibility for a procurement transaction shall participate in that transaction on behalf of the city when the employee knows that:

- (a)     The employee is contemporaneously employed by a bidder, offeror or contractor involved in the procurement transaction; or
- (b)     The employee, the employee's partner or any member of the employee's immediate family holds a position with a bidder, offeror or contractor such as an officer, director, trustee, partner or the like, or is employed in a capacity involving personal and substantial participation in the procurement transaction, or owns or controls an interest of more than five percent; or
- (c)     The employee, the employee's partner or any member of the employee's immediate family has a pecuniary interest arising from the procurement transaction; or
- (d)     The employee, the employee's partner or any member of the employee's immediate family is negotiating, or has an arrangement concerning prospective employment with a bidder, offeror or contractor.

Section 6. That section 3-3-128 of The Code of the City of Alexandria, Virginia, 1981, as amended, be, and the same hereby is, amended and reordained to read as follows:

Sec. 3-3-128            Purchase of building materials, etc., from architect or engineer prohibited.

- (a)     Except in cases of emergency, no building materials, supplies or equipment for any building or structure constructed by or for the city shall be sold by or purchased from any person employed as an independent contractor by the city to furnish architectural or engineering services, but not construction, for such building or structure, or from any partnership, association or corporation in which such architect or engineer has a pecuniary interest arising from the procurement.
- (b)     Except in cases of emergency, no building materials, supplies or equipment for any building or structure constructed by or for the city shall be sold by or purchased from any person who has provided or is providing design services to the independent contractor employed by the city to furnish architectural or engineering services for such building or structure, if such person (i) has specified a sole source for such materials, supplies or equipment, and (ii) has a pecuniary interest arising from the procurement in such architect or engineer.

Section 7. That section 12-4-6 of The Code of the City of Alexandria, Virginia, 1981, as amended, be, and the same hereby is, amended and reordained to read as follows:

(a) Any contract of over \$10,000, except any contract for the sale, purchase or rental of land, to which the city is a party shall include substantially the following provisions:

“Employment Opportunity. The contractor hereby agrees:

“(1) Not to discriminate against any employee or applicant for employment on account of race, color, sex, religion, ancestry, national origin, marital status, age, sexual orientation, disability, when such person is a qualified person with a disability, or any other basis prohibited by state law relating to discrimination in employment, except where there is a bona fide occupational qualification reasonably necessary to the normal operation of the contractor. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause.

“(2) To implement an affirmative action employment program as defined in section 12-4-3 of this chapter to ensure nondiscrimination in employment under guidelines to be developed by the commission and approved by the city council.

“(3) To include in all solicitations or advertisements for employees placed by or on behalf of the contractor the words “Equal Opportunity Employer” or a symbol, approved by the commission, meaning same.

“(4) To notify each labor organization or representative of employees with which said contractor is bound by a collective bargaining agreement or other contract of the contractor's obligations pursuant to this equal employment opportunity clause.

“(5) To submit to the city manager and the city's human rights administrator, upon request, no more frequently than annually, regular equal employment opportunity reports on a form to be prescribed by the city's human rights administrator with the approval of the city manager, except that the administrator may request more frequent special reports of particular employers provided the commission has found such employers to have violated any provision of this chapter.

“(6) Notices, advertisements and solicitations placed in accordance with federal law, rule or regulation shall be deemed sufficient for the purpose of meeting the requirements of this subsection.

“(7) To make reasonable accommodation to the known physical or mental limitations of an otherwise qualified person with a disability who is an applicant or employee unless the contractor can demonstrate that the accommodation would impose an undue hardship on the operation of its business.

“(8) That for the purpose of this section reasonable accommodation may include (i) making facilities used by employees readily accessible to and usable by persons with a disability and (ii) job restructuring, part-time or modified work schedules, acquisitions or modification of equipment or devices, the provision of readers or interpreters and other similar actions.

“(9) That in determining whether an accommodation would impose an undue hardship on the operation of the contractor's business, factors to be considered include but are not limited to the following:

“a. the overall size of the contractor's business with respect to the number of employees, the number and type of facilities and size of budget;

“b. the type of the contractor's operation, including the composition and structure of the contractor's work force; and

“c. the nature and cost of the accommodation needed.

“(10) That it may not deny any employment opportunity to a qualified person with a disability who is an employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

“(11) To include the provisions in subsections (1) through (10) of this clause in every subcontract so that such provisions will be binding upon each subcontractor.

“(12) That in the event of the contractor's noncompliance with any provision of this equal employment opportunity clause, upon a finding of such noncompliance by the city's human rights commission and certification of such finding by the city manager, the city council may terminate or suspend or not renew, in whole or in part, this contract.”

(b) The administrator is hereby authorized to:

(1) review the performance of any contractor who has a contract with the city with respect to the provisions of subsection (a) above;

(2) request equal employment opportunity reports, including but not limited to statistical data, from any contractor pursuant to subsection (a)(5) above; and

(3) upon a finding of probable cause to believe a violation of any provision of subsection (a) above has occurred, file a complaint with the commission pursuant to section 12-4-16 of this chapter.

(c) The commission is hereby authorized to:

(1) review any complaint filed by the administrator pursuant to subsection (b) above in accordance with procedures set forth in this chapter; and

(2) upon a finding of the commission that any contractor is in noncompliance with the provisions of subsection (a) above, the commission shall report the findings to the city manager.

(d) The city manager. If the city manager certifies the finding to the city council the city manager shall, unless city council directs otherwise, terminate or suspend or not renew, in whole or in part, as appropriate, the contractual relationship with the contractor; provided, however, that the city manager may defer temporarily a suspension or termination if he or she finds that the suspension or termination may disrupt or curtail a vital public service, or would otherwise not be in the best interests of the city, in which case the city manager shall report his or her action to the city council and indicate a date certain when the relationship will be suspended or terminated, or when the practice complained about will be remedied.

Section 8. That this ordinance shall become effective upon the date and at the time of its final passage.

KERRY J. DONLEY  
Mayor

Final Passage: January 26, 2002